TAN AH TONG

v.

PERWIRA HABIB BANK MALAYSIA BHD

COURT OF APPEAL, KUALA LUMPUR
NH CHAN JCA
MOKHTAR SIDIN JCA
HAIDAR MOHD NOOR JCA
[CIVIL APPEAL NO: W-02-65 OF 1996]
8 JULY 1998

COMPANY LAW: *Agency - Senior General Manager - Whether Senior General Manager has power to represent company - Whether rule in Turquand's case applies*

CONTRACT: *Guarantee - Discharge - Whether there was a discharge of guarantor - Whether there was such power to discharge guarantor*

The respondent bank provided loan facilities to the first defendant while the appellant together with the third, fourth and fifth defendants stood as guarantors. All of them were the directors of the first defendant. Judgment in default of appearance was entered against the first defendant on 12 February 1987 and the claims against the third and fourth defendants as guarantors were withdrawn by the respondent. In respect of the fifth defendant, a consent judgment was entered against him. The present appeal involved the appellant only wherein judgment was entered against him after a full hearing.

The appellant contended that the respondent through its Senior General Manager/Secretary (DW1) had discharged the appellant as guarantor via a letter dated 31 January 1985 (D3) while the respondent submitted that DW1 had no authority to discharge the appellant as guarantor. The respondent argued that according to the Deputy General Manager (PW1), such authority was vested in a committee comprising the executive director, the general manager and the company secretary, which would therefore include DW1.

The issue was whether the appellant had been discharged as guarantor by the respondent.

Held:
Per Haidar Mohd Noor JCA

[1] The appellant was entitled to rely on the authority of DW1 to discharge him as guarantor as DW1 held a senior position in the respondent bank. DW1 was not just an ordinary clerk or an insignificant officer in the bank. In fact he was one of the attorneys appointed by the bank. By virtue of his post he was a member of the committee that had the authority to discharge guarantors.

[2] DW1 did not tell the appellant that his application to be discharged should be referred to the committee and the conduct of DW1 was consistent with one who had the authority to discharge the appellant as guarantor. The appellant could therefore rely on the rule in *Turquand's* case.

[Appeal allowed.]

*[**Bahasa Malaysia** Translation Of Headnotes]*

Responden bank telah memperuntukkan kemudahan pinjaman kepada defendan pertama dan perayu bersama-sama defendan-defendan ketiga, keempat dan kelima telah menjadi penggerenti. Mereka semua adalah pengarah defendan pertama. Penghakiman pengingkaran kehadiran dimasukkan terhadap defendan pertama pada 12 Februari 1987 dan tuntutan terhadap defendan-defendan ketiga dan keempat sebagai penggerenti telah ditarikbalik oleh responden. Berkenaan dengan defendan kelima, penghakiman persetujuan telah dimasukkan terhadapnya. Rayuan ini melibatkan perayu sahaja di mana penghakiman telah dimasukkan terhadapnya setelah perbicaraan sepenuhnya.

Perayu telah berhujah bahawa responden melalui Pengarah Am Kanan/ Setiausahanya (SD1) telah melepaskan perayu sebagai penggerenti melalui surat bertarikh 31 Januari 1985 (D3) dan responden pula telah menghujahkan bahawa DW1 telah tidak mempunyai kuasa untuk melepaskan perayu sebagai penggerenti. Responden telah berhujah bahawa menurut Penolong Pengurus Am (SP1), kuasa tersebut terletakhak kepada suatu jawatankuasa yang terdiri dari pengarah eksekutif, pengarah am dan setiausaha syarikat, yang akan termasuk SD1.

Isunya adalah samada perayu telah dilepaskan sebagai penggerenti oleh responden.

Diputuskan:
Oleh Haidar Mohd Noor HMR

[1] Perayu adalah berhak bergantung kepada kuasa SD1 untuk melepaskannya sebagai penggerenti kerana SD1 memegang jawatan yang tinggi di bank responden. SD1 bukannya merupakan kerani biasa ataupun pegawai yang tidak penting dalam bank. Malah dia merupakan salah satu daripada wakil yang dilantik oleh bank. Berdasarkan jawatannya, dia merupakan ahli jawatankuasa yang mempunyai kuasa untuk melepaskan penggerenti.

[2] SD1 telah tidak memberitahu perayu bahawa permohonannya untuk dilepaskan patut dirujuk kepada jawatankuasa dan bahawa tindakan SD1 adalah selaras dengan seorang yang mempunyai kuasa untuk melepaskan perayu sebagai penggerenti. Maka perayu dapat bergantung kepada peraturan dalam kes *Turquand*.

[Rayuan dibenarkan.]

Cases referred to:
Howard v. Patent Ivory Manufacturing Co [1888] 38 Ch D 156 ***(foll)***
Pekan Nenas Industries Sdn Bhd v. Chang Ching Chuen & 12 Ors [1998] 1 CLJ 793 ***(cit)***
Royal British Bank v. Turquand [1856] 119 ER 474 ***(foll)***

Other sources referred to:
The Modern Contract of Guarantee, Dr John Phillips, 2nd edn, p 370
The Modern Contract of Guarantee, O'Donovan & Philips, 1992, p 370

For the appellant - Malik Amtiaz Sarwar; M/s Vazeer Akbar Majid & Co
For the respondent - Vinaga Raj; M/s Skrine & Co

[Appeal from High Court, Kuala Lumpur; Suit No: C3-23-4213-86]

Reported by Mariette Peters-Goh

JUDGMENT

Haidar Mohd Noor JCA:

This appeal is confined to only one issue. The issue is whether the appellant (second defendant) has been discharged as a guarantor by the respondent bank.

The appellant relied on a letter dated 31 January 1985 (exh. 'D3') addressed to the respondent bank by the appellant whereby the respondent bank through its then Senior General Manager/Secretary, Mazlan bin Khamis (DW1) purportedly confirmed the appellant's application to be discharged as a guarantor to the bridging loan and overdraft facilities ("loan facilities") given

to Asialand Housing Development Sdn. Bhd. (first defendant) by the respondent bank.

Facts

The respondent bank provided the loan facilities to the first defendant and as at 30 June 1986 a sum of RM3,448,111.44 together with interests as set out therein was due and payable (p. 17 of the Record). The appellant together with the third, fourth and fifth defendants stood as guarantors. All of them were directors of the first defendant.

Judgment in default of appearance was entered against the first defendant on 12 February 1987 and the claim against the third and fourth defendants as guarantors was withdrawn by the respondent bank. In respect of the fifth defendant, a consent judgment was entered against him. The present appeal involved the appellant only wherein judgment was entered against him after a full hearing.

The appellant was a guarantor to the loan facilities and that he executed the guarantees (pp. 63, 69 and 81 of the Record) in favour of the respondent bank in addition to the security by way of lands charged to the respondent bank. It seemed that at the date of the hearing of this suit, the charge action was still pending as the appellant was resisting it at all stages (see p. 16 of the Record).

The Issue

As intimated earlier on, the issue is centred on the letter dated 31 January 1985 (exh. 'D3') whereby the appellant contended that the respondent bank through its then Senior General Manager/Secretary, Mazlan bin Khamis (DW1) had discharged the appellant as a guarantor. Though it is not disputed that DW1 did endorse "I confirm the above" on D3, the respondent bank, however, contended that DW1 had no authority to discharge the appellant as a guarantor. Such authority, according to the respondent bank's witness, Tan Kwee Hee, its Deputy General Manager (PW1), is vested in a committee comprising of the executive director, the general manager and the company secretary of the respondent bank. It would therefore include DW1. According to PW1 he could not find D3 in the record of the respondent bank. PW1 was the deputy general manager of the respondent bank at the time when he gave evidence. He admitted that he was not personally in charge of the account in question in 1985.

As the defence of the appellant is centred on D3 it would be appropriate to set it out in full -

Tan Ah Tong
514-1A 3rd Mile
Jalan Ipoh
Kuala Lumpur.

31st January 1985

The General Manager
Perwira Habib Bank Malaysia Berhad
Wisma SPK, Jalan Sultan Ismail
Kuala Lumpur.

BY HAND

Dear Sir,

Re: 1. Overdraft Facility and Fixed Loan of S300,999/= each to Tan Realty Dev. Sdn. Bhd.

2. Loan and Overdraft Facility of $100,000 & $1.65M to Asialand Housing Dev. Sdn. Bhd.

Further to my letter of yesterday to you. Kindly confirm the following which were agreed by you at our meeting at your office on 30-1-85.

1. Perwira Habib Bank Malaysia Berhad has discharged Mdm Lim Weow @ Lim Neu and myself absolutely from all liabilities as guarantors for the above overdraft facility and loan to Tan Realty Development Sdn. Bhd. and in substitution thereof, Mr. Lim Han Kiong and Mr. Lim Kim Chin will be the new guarantors who will assume all the liabilities under the Guarantee and;

2. Perwira Habib Bank Malaysia Berhad has also discharged me absolutely from all liabilities as a guarantor of Asialand Housing Development Sdn. Bhd. in respect of the above loan and overdraft facility.

Thank you and best regards.

I confirm the above,

Yours faithfully,

Sgn. Sgn.

... ...

TAN AH TONG HJ. MAZLAN B. KHAMIS

It would appear from the opening paragraph of D3 that D3 was written by the appellant to confirm the meeting he had with the respondent bank on 30 January 1985, a day earlier. The appellant confirmed this in his evidence (see p. 28 of the Supplementary Record). Paragraph 2 of D3 is relevant as it relates to the defence relied on by the appellant. It clearly states that the appellant was discharged absolutely from all liabilities as a guarantor of the first defendant in respect of the loan facilities referred to therein. Such discharge was accordingly confirmed by the endorsement thereon on D3 by DW1. In the circumstances the appellant contended that he was accordingly discharged as a guarantor. Hence there should not be any claim against him as a guarantor by the respondent bank.

The appellant, in our view, is entitled to rely on the authority of DW1 to discharge him as a guarantor as DW1 held a senior position in the respondent bank. DW1 was not just an ordinary clerk or an insignificant officer in the respondent bank. According to PW1, DW1 was one of the Attorneys appointed by the respondent bank. In fact if we follow the evidence of PW1 he was by virtue of his post, a member of the committee that had the authority to discharge guarantors! According to the appellant DW1 did not tell him that he had no authority to do so though at the hearing DW1 under cross-examination admitted that he had no authority and that such authority was vested in a committee. The question is – how was the appellant to know of this fact? In that event he is entitled to invoke the rule in *Royal British Bank v. Turquand* [1856] 119 ER 474 commonly referred to as the Rule in Turquand's case (see *Pekan Nenas Industries Sdn. Bhd. v. Chang Ching Chuen & 12 Ors* [1998] 1 AMR p. 206).

It is, however, clear that the Rule in *Turquand's* case cannot be invoked by an outsider who knows or ought to know that there is an irregularity. In other words, such a person cannot invoke the benefit of the indoor management rule (see *Howard v. Patent Ivory Manufacuring Co.* [1888] 38 Ch. D. 156). In this case cl. 5 of the guarantee (p. 70 of the Record) provides for the release or discharge of any of the guarantors by the respondent bank. It reads:

> You shall be at liberty to release or discharge any of the Guarantors from the obligations of this guarantee or to accept any composition from or make any other arrangements with any of the Guarantors without thereby prejudicing or affecting your rights and remedies against the other or others of the Guarantors.

In other words this clause gives the respondent bank the power to release or discharge any of the guarantors without specifying the authority or the manner the release or discharge is to be executed.

The respondent bank, however, contended that the discharge of a guarantee in order to be legally binding, it must be under seal or supported by consideration and cited *The Modern Contract of Guarantee* by Dr. John Phillips, 2nd Edn at p. 370 in support therof. The short answer to that can be found in O'Donovan & Phillips, *The Modern Contract of Guarantee* (1992) at p. 370 where it is stated:

> The creditor and the guarantor may expressly agree to discharge the guarantee. **On normal contractual principles,** this will operate as a rescission of the contract of guarantee provided that it is legally binding, being either under seal or supported by consideration and provided that the creditor's agreement has not been procured by fraud. **The agreement may be oral, even though the original guarantee is required to be in writing** ...
>
> **If there is no consideration, however, the creditor's promise may still be effective as a waiver or as an estoppel.** (bold is ours)

It is manifest that the discharge may even be oral or be effective as a waiver or as an estoppel. Therefore the contention of the respondent bank that the discharge of a guarantee in order to be legally binding must be supported by consideration cannot, with respect, be accepted.

The learned judge erred in agreeing to the submission of the counsel for the respondent bank that the appellant could not rely on the Rule in *Turquand's* case or the concept of indoor management on the ground that DW1 told the appellant in the meeting held on 30 January 1985 that he had no authority to discharge the appellant (see p. 8 of the Supplementary Record). There was no such evidence before him to warrant such a conclusion. There was on the contrary the testimony of the appellant under cross-examination that DW1 did not tell the appellant that his application would be referred to the committee for a decision. The appellant did not know that DW1 had no authority to release him as a guarantor. In fact the conduct of DW1 was consistent with one who had such authority. Further, by way of cl. 5 of the guarantee the power to release or discharge is vested in the respondent bank thereby resulting in the appellant writing D3 to the respondent bank to confirm the matters discussed and agreed upon at the meeting with the respondent bank on 30 January 1985. One of the matters discussed must have been related to the discharge of the appellant as a guarantor. Consequently DW1 gave effect to the agreement by endorsing on D3 "I confirm the above". If it is otherwise the respondent bank would have issued a letter to the appellant rejecting his application for a discharge as a guarantor.

The feeble attempt by the respondent bank by way of cross-examination of DW1 to show that DW1 had no authority and DW1 attempting to explain what he meant by the words "I confirm the above" could not be accepted. Simply put, what he need to do is merely to acknowledge receipt of D3 and refer it to the committee with his recommendation. The endorsement of the words "I confirm the above" in relation to the contents of para. 2 of D3 clearly mean that the respondent bank through DW1 confirmed the agreement reached to discharge the appellant as a guarantor. For the record the respondent bank did discharge the third and fourth defendants as guarantors by withdrawing the suit against them.

We accordingly allowed the appeal with costs here and below. We ordered that the suit against the appellant be dismissed. Deposit to be refunded to the appellant.